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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

KRYSTAL KIMBERLY  
MCCORMICK,

Defendant and Appellant.

B292307

(Los Angeles County  
Super. Ct. No. PA090303)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael O’Gara, Judge. Affirmed.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant Krystal Kimberly McCormick pleaded no contest to a violation of Penal Code<sup>1</sup> section 273.5, subdivision (a). The trial court imposed various fines, fees, and assessments as conditions of probation. Defendant contends the fines, fees, and assessments should be stricken, or in the alternative, that the judgment should be reversed and remanded for the trial court to consider her ability to pay, citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) and *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*) in support. We affirm.

## II. BACKGROUND

On January 29, 2017, the Los Angeles County District Attorney filed a felony complaint against defendant alleging: assault with a deadly weapon, a felony (§ 245, subd. (a)(1); count 1); inflicting an injury on someone with whom defendant had, or previously had, a dating relationship, a felony (§ 273.5, subd. (a); count 2); and child stealing, a misdemeanor (§ 278; count 3). The District Attorney also alleged for counts 1 and 2 that defendant used a deadly weapon during the commission of the offense (§ 12022, subd. (b)(1)) and that she had served a prior prison term (§ 667.5, subd. (b)).

On July 10, 2018, defendant pleaded no contest to count 2. As part of the plea, the District Attorney agreed to dismiss counts 1 and 3 and the special allegations.

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise indicated.

The trial court suspended imposition of sentence and placed defendant on probation for five years, with various terms and conditions. The court also imposed the following fines, fees, and assessments: a \$40 court operations assessment (§ 1465.8, subd. (a)(1)); a \$30 criminal conviction assessment (Gov. Code, § 70373); a \$300 restitution fine (§ 1202.4, subd. (b)); a \$300 probation revocation fine, which was stayed unless probation was revoked (§ 1202.44); and a \$400 domestic violence fee (§ 1203.097, subd. (a)(5)).

### III. DISCUSSION

#### A. *Imposition of Fines, Fees, and Assessments*

Defendant, citing *Dueñas, supra*, 30 Cal.App.5th 1157, contends that the trial court erred in assessing fines, fees, and assessments without first conducting a hearing on her ability to pay, and that we must therefore reverse the order imposing them. “In *Dueñas*, . . . [the] court held it violated due process under both the United States and California Constitutions to impose a court operations assessment as required by . . . section 1465.8 or the court facilities assessment mandated by Government Code section 70373, neither of which is intended to be punitive in nature, without first determining the convicted defendant’s ability to pay.” (*Castellano, supra*, 33 Cal.App.5th at pp. 488-489.)

The Attorney General responds that defendant has forfeited this argument on appeal by failing to assert her inability to pay in the trial court. We agree that on these facts, defendant has forfeited her argument. Unlike the defendant in *Dueñas*,

defendant here had the statutory right to request that the trial court consider her ability to pay the domestic violence fee (§ 1203.097, subd. (a)(5)(A)),<sup>2</sup> but she did not do so.

A defendant who fails to object to probation-related costs in the trial court forfeits her challenge to such costs on appeal. (See, e.g., *People v. Aguilar* (2015) 60 Cal.4th 862, 864 [defendant forfeited appellate challenge regarding probation-related costs under §§ 1203.1b and 987.8]; *People v. Trujillo* (2015) 60 Cal.4th 850, 858-859 [defendant forfeited challenge to fees under § 1203.1b by failing to object below and not asserting an inability to pay].) “[Her] silence is a classic example of the application of the forfeiture doctrine relied upon by the California Supreme Court in numerous criminal sentencing cases decided well before *Dueñas*.” (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033.) Thus, by failing to object to the imposition of the domestic violence fee, or seeking an ability to pay hearing prior to the imposition of the fee, defendant has forfeited her challenge on appeal.

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<sup>2</sup> Section 1203.097 provides in pertinent part: “(a) If a person is granted probation for a crime in which the victim is a person defined in Section 6211 of the Family Code, the terms of probation shall include all of the following: [¶] . . . [¶] (5)(A) A minimum payment by the defendant of a fee of five hundred dollars (\$500) to be disbursed as specified in this paragraph. If, after a hearing in open court, the court finds that the defendant does not have the ability to pay, the court may reduce or waive this fee. If the court exercises its discretion to reduce or waive the fee, it shall state the reason on the record.” The Legislature set the \$500 amount in 2012. (Stats. 2012, ch. 511, § 1.) The initial version of this section set the minimum fee at \$400. (Stats. 2003, ch. 431, § 2.)

Similarly, we conclude that by failing to raise an objection to the \$400 domestic violence fee, defendant has forfeited her challenge to the remaining fines, fees, and assessments. (*People v. Gutierrez, supra*, 35 Cal.App.5th at pp. 1033-1034.)

B. *Defendant Has Not Demonstrate that Her Counsel Was Ineffective*

Defendant next contends that her counsel rendered ineffective assistance by failing to object to the trial court's imposition of the fines, fees, and assessments, including the \$400 domestic violence fee, without first holding an ability to pay hearing. "An attorney's performance is constitutionally deficient if (1) it falls below an objective standard of reasonableness under prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*People v. Grimes* (2016) 1 Cal.5th 698, 735.) The burden of proof is on the defendant claiming ineffective assistance of counsel. (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1007.) ""The proof . . . must be a demonstrable reality and not a speculative matter."" (*Ibid.*) Where, as here, a defendant challenges her counsel's failure to object, ""[i]f the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation."" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1312-1313.)

The record here does not support a conclusion that counsel was unreasonable in failing to object to the fines, fees, and

assessments. We can discern at least two reasons why trial counsel did not object. First, and contrary to defendant's assertion, the record does not indicate one way or the other whether defendant was able to pay. Although, as defendant points out, defendant was represented by appointed counsel during the proceedings, the probation report reflects that defendant used "her vehicle" to strike the victim and take away their child, and had resided at the same house for nine months, and also lists defendant's employment and financial status as "unknown." If defendant did have the ability to pay, trial counsel would not be ineffective by failing to object. (See *People v. Thompson* (2010) 49 Cal.4th 79, 122 ["Counsel is not ineffective for failing to make frivolous or futile motions"].) Second, defendant received a reduction in the domestic violence fee of \$100. A trial counsel could act reasonably by not objecting if doing so would highlight undesirable evidence for defendant. (*People v. Catlin* (2001) 26 Cal.4th 81, 165.) Accordingly, on this record, defendant has failed to meet her burden to demonstrate that her trial counsel was ineffective for failing to object to the imposition of the fines, fees, and assessments.

#### **IV. DISPOSITION**

The judgment is affirmed.

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KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.